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TESTIMONY:

For Plaintiff:

New Jersey Supreme Court

Notice of Appeal.

JESSIE B. SEWALL and ELBRIDGE C. SEWALL, her husband, *Plaintiffs,* *vs.* D. ALVIN FOX and SALLIE S. FOX. *Defendants.*	Action At Law.

To Messrs. Porter, Zink & Lafferty,
Attorneys for Defendants.

TAKE NOTICE that the plaintiffs above named do hereby appeal to the New Jersey Court of Errors and Appeals, in the last resort in all causes, from the whole and every part of the judgment of non-suit entered in favor of the defendants and against the plaintiffs in the above entitled cause.

Dated January 31st, 1923.

Respectfully yours,
McDERMOTT, ENRIGHT & CARPENTER
Attorneys for Plaintiffs.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Grounds of Appeal.

JESSIE B. SEWALL and ELBRIDGE C. SEWALL, her husband,

Plaintiffs-Appellants,

vs.

D. ALVIN FOX and SALLIE S. FOX.

Defendants-Appellees.

The plaintiffs-appellants hereby assign the following as their grounds of appeal in the above cause.

(1) Because the trial judge before whom the said cause was tried, erroneously overruled plaintiffs' offer to prove the allegations in their complaint.

(2) Because the learned judge before whom the said cause was tried, erroneously non-suited the plaintiffs.

(3) Because the court below erroneously entered a judgment of non-suit against plaintiffs...

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Appellants.

NEW JERSEY SUPREME COURT.

Judgment of Non-suit.

(filed May 29, 1922.)

JESSIE B. SEWALL and ELBRIDGE C. SEWALL, her husband,
Plaintiffs,
vs.
D. ALVIN FOX and SALLIE S. FOX,
Defendants.

Judgment Record. Action At Law.

PORTER, ZINK & LAFFERTY,
Attorneys.

D. Alvin Fox and Sallie S. Fox the defendants in this cause were summoned to answer unto Jessie B. Sewall and Elbridge C. Sewall, her husband, the plaintiffs therein, in an action at law upon the following complaint:

(Summons issued May 24, 1922.)

Plaintiffs residing in the Town of Montclair, Essex County, New Jersey, say that:

FIRST COUNT

(1) On the 14th day of February, 1922, defendants were the owners of and in possession of the premises known as No. 133 Montclair Avenue, Montclair, New Jersey, in front of which on Montclair Avenue there was a concrete sidewalk owned and maintained by the defendants for the use of pedestrians lawfully walking upon Montclair Avenue aforesaid.

(2) That an ordinance of the Town of Mont-

clair aforesaid entitled, "An Ordinance to provide for the removal of snow and ice from the sidewalks and gutters of streets, avenues and highways in the Town of Montclair", adopted December 23rd, 1912 provides that:

> "The owner, owners, occupant or occupants of premises abutting or bordering upon any street, avenue or highway in the Town of Montclair shall remove all ice or snow from the sidewalks of any such street, avenue or highway, or in the case of ice which may be frozen to the sidewalks as to make the removal of same impossible, shall cause same to be thoroughly covered with sand or ashes, within eight hours of daylight after the same shall be formed or shall fall thereon."

as by a reference to the said Ordinance will more fully and at large appear.

(3) That the defendants violated the said Ordinance in that they did not remove all ice and snow from the sidewalk in front of their said residence and premises at No. 133 Montclair Avenue, Montclair, New Jersey, and they did not cause the ice upon the said sidewalk to be thoroughly covered with sand or ashes within eight hours of daylight after the same had been formed or fallen thereon, by reason whereof plaintiff, Jessie B. Sewall, while walking upon and over the sidewalk in front of the defendants' premises at No. 133 Montclair Avenue, Montclair aforesaid, on the evening of February 14, 1922, at about six P. M., slipped on the ice and snow which the defendants had carelessly and negligently permitted to remain upon the said sidewalk and suffered the damages and injuries hereinafter described.

(4) That by reason of her said fall on the side-

walk as above mentioned, the bones in the right shoulder and right arm of the plaintiff Jessie B. Sewall were broken and fractured, and the plaintiff Jessie B. Sewall was removed to a hospital in the Town of Montclair where she remained from the day following the said accident until April 3, 1922, and said plaintiff also suffered severe pain and nervous injuries and shock, and since her return from the said hospital has been confined to her bed and will in the future be confined to her bed and in her home for a long period of time, and has suffered grievous and permanent disability to her right arm.

SECOND COUNT

(1) On the 14th day of February, 1922, defendants were the owners of and in possession of the premises known as No. 133 Montclair Avenue, Montclair, New Jersey, in front of which, on Montclair Avenue there was a concrete sidewalk owned and maintained by the defendants for the use of pedestrians lawfully walking upon Montclair Avenue aforesaid.

(2) That is was the duty of the defendants on the day and year aforesaid to keep the sidewalk in front of their said residence free and clear of ice and snow and to spread ashes, sand, sawdust and other like substances upon the ice on the sidewalk in front of their property aforementioned for the safety of persons lawfully using the sidewalk of the defendants aforesaid.

(3) That on the 14th day of February, 1922, about the hour of six o'clock in the evening of said day, the said Jessie B. Sewall while walking upon and over the sidewalk in front of the de-

fendants' premises at No. 133 Montclair Avenue, Montclair, aforesaid, slipped on the ice and snow which the defendants had carelessly and negligently permitted to remain upon the said sidewalk, and suffered the damages and injuries hereinafter mentioned and described.

(4) That by reason of her said fall on the sidewalk as above mentioned, the bones in the right shoulder and right arm of the plaintiff Jessie B. Sewall were broken and fractured, and the plaintiff Jessie B. Sewall was removed to a hospital in the Town of Montclair where she remained from the day following the said accident until April 3, 1922, and said plaintiff also suffered severe pain and nervous injuries and shock, and since her return from the said hospital has been confined to her bed and will in the future be confined to her bed and in her home for a long period of time, and has suffered grievous and permanent disability to her right arm.

(5) The defendants were negligent in the following respects.

(a) Defendants did not keep the sidewalk in front of their residence aforesaid free and clear of ice, snow and slush in accordance with the provisions of an Ordinance of the Town of Montclair aforementioned.

(b) Defendants were negligent in that they did not remove the ice and snow and slush which had accumulated on the sidewalk in front of their residence aforesaid during the 12th and 13th days of February, 1922.

(c) Defendants were negligent in that they did not cause ashes, sand, sawdust or other like substances to be spread on the ice which was on the sidewalk in front of defendants' residence in Montclair aforesaid on February 14, 1922.

Plaintiff Jessie B. Sewall demands $15,000. damages.

THIRD COUNT

(1) Plaintiff, Elbridge C. Sewall resides in Montclair aforesaid, and is the husband of Jessie B. Sewall mentioned in the first and second counts herein, and on the date mentioned, to wit, February 14, 1922, was living with his said wife.

(2) Plaintiff Elbridge C. Sewall by reason of the injuries to his said wife as aforesaid has incurred large hospital, medical and surgical bills and expenses in attempting to effect a cure of the injuries sustained by his wife as aforementioned; that to April 22, 1922, this plaintiff paid for nursing and hospital expenses the sum of $1187.55, and in addition thereto has incurred large expenses for physicians, surgeons and experts and in the future will be obliged to expend large sums of money for physicians, surgeons and nurses to care for and attempt to cure his said wife.

(3) That by reason of the matters aforesaid the plaintiff Elbridge C. Sewall has lost the services of his said wife from and after the 14th day of February, 1922, and will continue to lose the services of his said wife for a long time in the future.

Plaintiff Elbridge C. Sewall demands $5000 damages.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Plaintiffs.

ANSWER

(Filed June 8, 1922.)

Defendants residing in the Town of Montclair, Essex County, New Jersey, say that:

1. They admit the allegations of paragraph 1 of the first count.

2. They admit the allegations of paragraph 2 of the first count.

3. They deny the allegations of paragraph 3 of the first count.

4. They deny the allegations of paragraph 4 of the first count.

5. They admit the allegations of paragraph 1 of the second count.

6. They deny the allegations of paragraph 2 of the second count.

7. They deny the allegations of paragraph 2 of the second count.

8. They deny the allegations of paragraph 4 of the second count.

9. They deny the allegations of paragraph 5 of the second count.

10. They admit the allegations of paragraph 1 of the third count.

11. They deny the allegations of paragraph 2 of the third count.

12. They deny the allegations of paragraph 3 of the third count.

FIRST DEFENSE TO FIRST COUNT

The defendants were not guilty of negligence.

SECOND DEFENSE TO FIRST COUNT

The defendants, on February 14, 1922, and prior thereto, performed all duties imposed upon them by the ordinance referred to in paragraph 2 of the first count.

THIRD DEFENSE TO FIRST COUNT

The plaintiff, Jessie B. Sewall, was guilty of contributory negligence in that she negligently and carelessly exposed herself to the risk of such an accident, and neglected to take precaution or to exercise care to guard and protect herself against such an accident.

FIRST DEFENSE TO SECOND COUNT

The defendants were not guilty of negligence.

SECOND DEFENSE TO SECOND COUNT

The defendants on February 14, 1922 and theretofore, performed all duties imposed upon them by reason of their ownership of the premises referred to in the complaint.

THIRD DEFENSE TO SECOND COUNT

The plaintiff, Jessie B. Sewall, was guilty of contributory negligence in that she negligently and carelessly exposed herself to the risk of such an accident, and neglected to take precaution or to exercise care to guard and protect herself against such an accident.

FIRST DEFENSE TO THIRD COUNT

Whatever damages the plaintiff, Elbridge C. Sewall, has suffered, were caused by the contributory negligence of the plaintiff, Jessie B. Sewall, in that she negligently and carelessly exposed herself to the risk of such accident and neglected to take precaution or to exercise care to guard and protect herself against such accident.

PORTER, ZINK & LAFFERTY,
Attorneys for Defendants.

REPLY
(Filed June 9, 1922.)

(1) Plaintiffs deny each and every allegation in the first, second and third defenses to the first count.

(2) Plaintiffs deny each and every allegation in the first, second and third defenses to the second count.

(3) Plaintiffs deny each and every allegation in the first defense to the third count.

Plaintiffs join issue on the answer of the defendants.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Plaintiffs.

JUDGMENT

This action was tried before Nelson Y. Dungan, with a jury at the Essex Circuit Court on January 29, 1923. The plaintiffs having stated the facts which they proposed to prove, the defendants objected thereto on the ground that said facts did not state a cause of action. The defendants ob-

jection was sustained. The plaintiffs then rested. The defendant then moved for a non-suit, which was granted.

Whereupon it is adjudged that the complaint of plaintiffs be dismissed and that the defendants D. Alvin Fox and Sallie S. Fox do recover of the said plaintiffs Jessie B. Sewall and Elbridge C. Sewall, her husband, their costs which have been taxed at the sum of

Costs $ 10

Judgment entered February 1, 1923.

WM. S. GUMMERE,
C. J.

Testimony.

NEW JERSEY SUPREME COURT.
ESSEX CIRCUIT.

Monday, January 29, 1923.

JESSIE B. SEWALL and ELBRIDGE C. SEWALL, her husband, *vs.* D. ALVIN FOX and SALLIE S. FOX.	Action At Law.

BEFORE:

HON. NELSON Y. DUNGAN, J., and a jury.

For the plaintiffs appear MESSRS MCDERMOTT, ENRIGHT & CARPENTER, (By JAMES D. CARPENTER, JR.).

For the defendants appear MESSRS. PORTER, ZINK & LAFFERTY, (By NEWTON H. PORTER and FRANCIS LAFFERTY).

(A jury is called and sworn.)

Mr Carpenter opens in behalf of plaintiff.
Mr. Lafferty opens in behalf of defendant.

WILLIAM H. ARESON, sworn in behalf of plaintiff.

DIRECT EXAMINATION BY MR. CARPENTER:

Q. Doctor, where do you practice? A. Montclair.

Q. How long have you been practicing there? A. Twenty-seven years.

THE COURT: (After argument). Perhaps we can shorten this matter very much if I state my views on the law. This is not a motion to strike out the complaint, and so, perhaps, the best plan, if you desire to shorten the case in order that the question may be properly raised, is to offer to prove the facts stated in the complaint, just what you expect to prove, and then, if that is objected to by the other side, the court may rule upon that and thus squarely raise the question.

MR. CARPENTER: I offer to prove an ordinance of the town of Montclair, found on page 69 of the ordinances of that town, of which I have here a certified copy, which was adopted June 23, 1912; and I also offer to prove all of the allegations in the complaint, namely, that the plaintiff, Mrs. Sewall, on the afternoon of February 14, 1922, at about six o'clock, alighted from an automobile at McDonough Street and Montclair Avenue, and while walking over the side-

walk of the defendant to her home fell upon the snow and ice which had accumulated thereon and which had not been removed, and fractured her right arm at the juncture of the ball of the shoulder joint and the humerus; that she was confined to a hospital some seven weeks, and that her husband's expenses were over two thousand dollars for medical and hospital care and attention. I also offer to prove that this snow was upon the defendant's walk, some of it had fallen the week before; that on the Sunday before, February 12th, there had been snow and sleet which fell to a depth of approximately two inches; that February 13th was clear all day, and it was clear substantially all of the 14th, no snow having fallen between Sunday and six o'clock on the 14th of February; and that more than eight hours of daylight had intervened between the fall of snow and the accident.

THE COURT: You do not insist that for this accumulation the defendant was in any way responsible, but what you do insist is that he had permitted this to remain as it had fallen and had refrained from removing it?

MR. CARPENTER: Yes; and that he had not put sand, ashes or other substances on the accumulation which would prevent people walking over it from slipping and falling.

MR. LAFFERTY: I object to the offer of that testimony.

MR. CARPENTER: I had better state that it was warm in the middle of the day on the

13th and 14th, but it had turned cold and had frozen over the sidewalk at the time the plaintiff fell.

THE COURT: Assuming these facts to be true, as I must, for the basis of this motion, I think the objection to the offer of that testimony must be sustained.

MR. CARPENTER: I ask an exception.

THE COURT: I think the proper procedure would be for you to rest your case and then have a motion for a non-suit.

MR. CARPENTER: I rest my case.

MR. LAFFERTY: And I would move for a non-suit.

THE COURT: The non-suit must be granted, as there is no testimony in the case which would permit the plaintiff to recover. The question involved I do not consider an open question in this state. My attention has been called to the consideration of this precise question in two instances. The first is found in 8 N. J. L. J. page 296, which was in this circuit, and the decision was given by Justice Depue in the case of Snowden vs. Dodd for damages by falling on ice in front of the defendant's house. "The declaration alleged that the defendant had not complied with the city ordinance, directing the removal of ice from sidewalks. In demurrer to the declaration, judgment was given for the defendant on the ground that no civil liability grew out of the ordinance." The next case is that of Courtney vs. Central Railroad of New Jersey, found in 18 Law Journal, decided in 1895 by Mr. Justice Van Syckel. "The declaration alleges that the defendant

owns a lot of land on the easterly side of Catherine Street, in the city of Elizabeth. That in December, 1893, the defendant permitted and allowed the water falling from the clouds upon the sidewalk in front of said lot to congeal and form ice thereon; that defendant permitted and allowed the water falling from the clouds upon said lot to run from said lot over said sidewalk into the gutter; that defendant permitted and allowed the water falling from the clouds upon said lot and running over said sidewalk to congeal and form ice on said sidewalk; and permitted and allowed said ice to remain without sprinkling or sand, in consequence of which the plaintiff slipped upon said ice and was injured, etc.

"To this declaration the defendant filed general demurrer."

Justice VAN SYCKLE held that:

"An abutting owner on the highway as such owes no duty to maintain the street or sidewalk in front of his house or premises, and is not responsible for any defects therein which are not caused by his own wrongful act. Ordinance requiring persons to keep their sidewalks free from ice imposes a purely public duty and persons injured by slipping on the ice cannot bring private action against the owners of the premises." Citing Snowden vs. Dodd, he concludes: "The demurrer is well taken, and there must be judgment for defendant with costs."

Following this, in 1902, is the case of Fielders vs. North Jersey Street Railway

Company, the opinion in that case in the Court of Errors and Appeals having been written by Mr. Justice Pitney, and in it he says: "We find running through the adjudicated cases a rule of construction almost universally adopted, that where the provisions of an ordinance are intended not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, and more particularly if they impose upon property-owners the performance of a part of the duty of the municipality to the public, a legislative intent is indicated that a breach of such ordinance shall be remediable only at the instance of the municipal government or by enforcement of the penalty prescribed therein; and that there shall be no right of action to an individual citizen especially injured in consequence of such breach. The most conspicuous cases of this sort are those that deny liability to private suit for violation of the duty imposed by ordinance upon abutting property-owners to maintain sidewalk pavements or to remove ice and snow from the walks." Mr. Justice Pitney then cites a number of cases from New York State, Massachusetts, Connecticut, Maryland and Michigan, all of which I have not examined, but I have the case of Moore vs. Gadson, in the Court of Appeals of New York, recorded in 93 New York on page 12, in which the court holds: "A municipal ordinance is not of itself sufficient to give a cause of action to a party

injured by an act in violation of its provisions."

"One whose fall was occasioned by the omission of the city to cause the removal from a sidewalk of accumulated snow and ice cannot recover damages from the owner of the building adjoining, although an ordinance made it the duty of the owner to remove the snow and ice within a specified time after its accumulation." There is also the case of Rupp vs. Burgess in our Supreme Court, which is not a snow and ice case, but is a sidewalk repair case, where the principle, I should think would be the same, and Fielders vs. North Jersey Street Railway Company which has already been quoted, is cited. The court said: "And even when the duty of repairing sidewalks is imposed upon the abutting owner by statute or ordinance, the failure to perform that duty does not render the owner responsible to individuals for injuries received by them, resulting from defects in the sidewalk due to want of repair. The only liability which rests upon the property owner for the non-performance of such a duty is the penalty provided by the statute or ordinance."

This case, according to the pleadings and according to the testimony offered, is directly in line with those cases and in the view of the court gives the plaintiff in this case no right of action against the defendant for injuries sustained by her. This is the reason for the granting of the non-suit.

Plaintiffs' counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Ordinance.

An Ordinance to provide for the removal of snow and ice from the sidewalks and gutters of streets, avenues and highways in the Town of Montclair.

Be it ordained by the Council of the Town of Montclair, in the County of Essex as follows:

Section 1. The owner, owners, occupant or occupants of premises abutting or bordering upon any street, avenue or highway in the Town of Montclair shall remove all ice or snow from the sidewalks of any such street, avenue or highway, or in the case of ice which may be so frozen to the sidewalks as to make the removal of same impossible, shall cause same to be thoroughly covered with sand or ashes, within eight hours of daylight after the same shall be formed or shall fall thereon, under a penalty of five dollars for each such failure, to be paid by the said owner, or owners, occupant or occupants of said premises, severally and respectively.

He shall likewise remove all ice and snow from the gutters in front of his premises before the same shall obstruct the flow of water along the same, under a like penalty.

Section 2. No person or corporation shall throw, place or deposit any snow or ice into or upon any street or highway in said Town, nor move or remove any snow or ice in any street or highway from one part thereof to another, without leveling and spreading the same in such a manner as to avoid and prevent the formation of banks or mounds, under the penalty of five dollars for each and every offense.

Section 3. In case such snow or ice shall not

be removed from such sidewalk or gutters by the owner or owners or occupant or occupants of any premises as provided in Section 1 of this Ordinance, the same shall be removed by or under the direction of the Supervisor of Roads and Improvements of the Town, and the cost thereof, as nearly as can be ascertained, shall be certified to the Board of Assessors, whose duty it is to assess and levy the taxes of said Town of Montclair, and shall thereupon become and be a first and paramount lien upon such premises, and shall be added to, recorded and collected with and in the same manner as the taxes next to be assessed and levied upon such premises, and the imposition and collection of the fine or fines imposed by this ordinance shall not be construed to be any bar to the right of the said Town of Montclair to collect the costs of removal of said snow or ice in the manner herein authorized, but the remedies shall be cumulative.

Section 4. Section 1 of this ordinance shall not apply to any sidewalk wherein at the time of such snow so fallen or ice so formed there shall not be laid either to the whole width or a part thereof a sidewalk with flagging, cement, concrete, plank, boards or some artificial covering, nor shall it apply to an occupant not living on the first floor of a building wherein two or more families reside, unless such occupant be also the owner of the premises.

The term "occupant" in this ordinance shall be deemed to be the occupant of the first floor of the building on the premises; but where and while there is no such occupant, then the occu-

pant of the first floor above which is occupied.

Section 5. All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

Adopted December 23rd, 1912.

ATTEST:

E. C. HINCK,
(Seal)
Mayor,

HARRY TRIPPETT,
Town Clerk.

A true copy
HARRY TRIPPETT,
Town Clerk.

New Jersey Court of Errors and Appeals.

JESSIE B. SEWALL, et al., *Plaintiffs-Appellants,* *vs.* D. ALVIN FOX, et al., *Defendants-Appellees.*	Action at Law: On Appeal from Supreme Court.

BRIEF OF McDERMOTT, ENRIGHT & CARPENTER, FOR PLAINTIFFS-APPELLANTS.

Plaintiffs appeal from a judgment of non-suit entered in the Supreme Court. After the trial was started before Hon. Nelson Y. Dungan in the Essex Circuit, Judge Dungan raised the question of the right of the plaintiffs to recover assuming all of plaintiffs' allegations were true. This question having been raised by the trial court and argued at length, plaintiffs offered to prove an Ordinance of the Town of Montclair and all of the facts alleged in the complaint, which offer the Court overruled and allowed plaintiffs an exception to the ruling. Plaintiffs then rested and the Court granted defendants' motion for a non-suit, to which plaintiffs excepted.

Plaintiffs assign as error the refusal of the Court to permit plaintiffs to prove the allegations of their complaint, to which an exception was taken, and the action of the Court, over objection, in granting a non-suit to the defendants.

The Facts.

The plaintiff Mrs. Jessie B. Sewall about [illegible] P. M. on February 14, 1922, alighted from [illegible] automobile at McDonough Street and Mon[illegible] clair Avenue, in Montclair, and while walki[illegible] to her home over the sidewalk in front of [illegible] residence of the defendants fell upon the ice an[illegible] snow which had accumulated thereon, and whic[illegible] had not been removed for two days. When plaintiff fell on the ice she fractured her right arm at the juncture of the ball of the shoulder joint and the humerus. She was confined to a hospital some seven weeks and her husband's expenses were over $2,000 for medical and hospital care and attention. Some of the snow on defendants' walk had fallen the week before the accident. On the Sunday before the accident, February 12th, snow and sleet had fallen to a depth of approximately two inches. February 13th was clear all day and it was clear substantially all of February 14th, no snow having fallen between Sunday, February 12th and six P. M. February 14th, when Mrs. Sewall suffered her accident. More than eight hours of daylight had intervened between the last fall of snow and the accident. The defendants had neither caused the snow and ice to be removed from their sidewalk, nor had they put sand, ashes or other substances on the accumulations of ice and snow so as to prevent people walking over the sidewalk from slipping and falling. (pp. 12 and 13 of the record; allegations of the complaint pp. 3, 4 and 5)

The defendants admitted that they were the owners of and in possession of the premises known as No. 133 Montclair Avenue, Montclair, N. J., in front of which on Montclair Avenue there was a concrete sidewalk owned and main-

ed by the defendants for the use of pedes-
ns lawfully walking upon Montclair Avenue.
omplaint par. 1, p. 3; admission Answer
. 1, p. 8)

An Ordinance of the Town of Montclair, adopt-
December 23, 1912, provided:

"The owner, owners, occupant or occupants of premises abutting or bordering upon any street, avenue or highway in the Town of Montclair shall remove all ice or snow from the sidewalks of any such street, avenue or highway, or in the case of ice which may be so frozen to the sidewalks as to make the removal of same impossible, shall cause same to be throughly covered with sand or ashes, within eight hours of daylight after the same shall be formed or shall fall thereon, under a penalty of five dollars for each such failure, to be paid by said owner, or owners, occupant or occupants of said premises, severally and respectively.

"He shall likewise remove all ice and snow from the gutters in front of his premises before the same shall obstruct the flow of water along the same, under a like penalty." (p. 18, Section 1.)

The Ruling of the Trial Court.

Judge Dungan was of the opinion that under the decision in *Fielders vs. North Jersey Street Railway Company,* 68 N. J. L., 352, *Snowden vs. Dodd,* 8 N. J. L. J., 296, and *Courtney vs. Central R. R. Co.,* 18 N. J. L. J., 173, the violation of such an ordinance gave no right of action to a person sustaining injuries because of the failure of an abutting property owner to clean off the sidewalks as required by the ordinance.

The rulings of Justice Depue in *Snowden vs. Dodd* in the Essex Circuit and of Justice Van

Syckle in the Union Circuit in *Courtney vs. Central Railroad,* went upon the theory that such an ordinance imposes a purely public duty and that persons injured by slipping on the ice cannot bring private actions against the owners of the premises.

This question does not seem to have been before presented to this Court for consideration.

POINT I.

The violation by Defendants of the Snow Removal Ordinance was *Ipso Facto* a Negligent Act.

Plaintiffs' complaint alleged negligence on two counts. The first count alleged the Ordinance and that the defendants violated the same in that they did not remove all ice and snow from in front of their premises within eight hours of daylight after the same had been formed or had fallen thereon, and in that they did not cause the ice upon the sidewalk to be thoroughly covered with sand or ashes within eight hours of daylight after the same had been formed or fallen thereon (p. 4). The second count alleged the common law duty of the defendants to keep their sidewalks free and clear of ice and snow and to spread ashes, sand, sawdust and other like substances upon the ice on the sidewalk for the safety of persons lawfully using the sidewalks of the defendants (p. 5).

In *Cooper vs. Reinhardt,* 91 N. J. L., 402, the Supreme Court held:

> "The fact that a hotelkeeper knew that his entrance steps and platform were covered with snow and slush which were freezing, and did not within three and a half hours after the snow stopped falling have them cleared or otherwise cared for, but allowed a depart-

ing guest to use them in that condition, to his injury, justifies a finding that the hotelkeeper was negligent."

It is a thoroughly established principle that sidewalks are for the use of the public and they are presumed to be free from obstructions for their full width.

Durant vs. Palmer, 5 Dutcher, 544.

In *Fielders vs. North Jersey Street Railway Company, Supra.*, the Court was not considering a snow removal ordinance and that portion of the opinion which relates to such ordinances is dictum, and the dictum was based upon the supposition that the provisions of such ordinances are intended not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, and more particularly if they impose upon property owners the performance of a part of the duty of the municipality to the public.

The Ordinance of the Town of Montclair, upon which our action is based, cannot, we submit, fairly be said to be an ordinance not intended for the benefit or protection of individuals comprising the public. The provisions of the Ordinance which indicate that it is for the protection of individuals rather than for the public at large, is the portion which provides that "if it is impossible to remove the ice the same shall be thoroughly covered with sand or ashes within eight hours of daylight".

There might be some force to the argument that a town such as Montclair might wish to have the snow removed from the gutters so that the surplus water, which otherwise might accumulate when it commences to thaw, would run away, to the end that the public health in general might be benefited. The provision for placing sand

or ashes upon the ice can have but one purpose, and that is, the safeguarding of the individual who is obliged to walk over the sidewalks. So, the provision for removing the snow and ice from the sidewalks is undoubtedly designed to enable the residents of the town—those who must use the sidewalks in going shopping or going to and from trains—freely, conveniently and safely to walk in the place designated by the town for pedestrians to walk. Under present day conditions, when there are automobiles in the streets almost as much in Winter as in Summer, sidewalks must be open to those who cannot ride. Therefore it is an argument that originated in age-old conditions which urges that the provision for cleaning sidewalks is for the benefit of the municipality rather than for the benefit of the individual.

In *Evers vs. Davis,* 86 N. J. L., 196, this Court considered a case against the owner of a tenement house who had violated the Tenement House Act of 1904, (P. L. p. 152), which required that all non-fireproof tenements more than three stories in height should be furnished with exterior fire escapes and prescribed a specific penalty for the violation of any of the provisions of the act. It was contended that this was a purely public statute enforceable by specified penalties and evincing no legislative intention that there shall be a private right of action for the persons injured as a result of the violation of its provisions. Justice Garrison, speaking for this Court, after referring to the fact that the reasonable prudent man at common law is a law abiding citizen, said:

> "Upon common law principles, therefore, when the legislature has by public statute established a certain standard of conduct

in order to prevent a danger that it foresaw, it has in this regard forewarned the 'ordinary prudent man' and through him the defendant in a civil action, whose conduct must always coincide with this common law criterion. Such danger, therefore, does not have to be proved by the plaintiff, since there is no longer room for a reasonable difference of opinion, for by his breach of the statute the defendant, through his common law conscience, is charged with knowledge that if injury ensues he will have acted at his peril." (at p. 204)

"It is the necessary corollary of these views that the defendant in such action of negligence retains all of the defences appropriate to such action that are not affected by such penal statute which, as we have seen, operates conclusively upon the basis of the defendant's liability but not at all upon the *factum* of such liability. The operation of such a statute, in fine, is that the defendant's duty toward the plaintiff as affected by such statute takes the place of what would have been his common law duty if such statute had not been enacted, leaving the action of negligence in other respects unaffected by such statute. Thus a defendant, although he cannot be heard to say that it was not his duty to obey the statute, may show what he did in his effort to obey it, leaving it to the jury to say whether such effort was what a reasonably prudent person would have done in view of the statute." (at p. 205)

See also *Cittadino vs. Schackter,* 83 N. J. L., p. 593.

This Court since *Evers vs. Davis, Supra.,* has applied the same principle to many different statutes and many different situations.

In *Feir vs. Weil,* 92 N. J. L., 610, this Court held that a child under fourteen years of age, employed in violation of the Factory Act, P. L. 1904, p. 152, may maintain a common law action

for negligence against the employer, although the statute itself gives no civil remedy or private right of action. The breach of such statute is *prima facie* evidence of negligence.

It has also been held by this Court that the violation of one or more of the provisions of the Vehicular Traffic Act are *prima facie* evidence of negligence to take the case to the jury.

Winch vs. Johnson, 92 N. J. L., 219; *Chiapparine vs. Public Service Ry. Co.*, 91 N. J. L., p. 581.

This Court has also held that the allegations of an indictment were sustained by proof that the plaintiff in error ran his automobile through a city street at a rate of speed in excess of the rate permitted by Section 23 of the Motor Vehicle Act, and that endangered public safety, and that actually resulted in the injury of a pedestrian.

The State vs. Schutte, 88 N. J. L., 396.

Instances are too numerous to mention where railroads have been held negligent for not giving the warning at grading crossings required to be given by Section 35 of the Railroad Act.

The principle therefore seems to be well settled in this State that the violation by the defendants of the snow and ice ordinance of Montclair gave the plaintiffs a right of action against the defendents for negligence, since the plaintiff, Mrs. Jessie B. Sewall, while lawfully walking over the sidewalk of the defendants, fell because of the accumulation of snow and ice which had not been removed, and which was not covered by sand, ashes or other like substances, provided Montclair had the power to enact such an ordinance.

POINT II.

The Ordinance of the Town of Montclair was valid.

The question of the validity of the Ordinance was not raised below.

The power of the Council of the Town of Montclair to adopt the ordinance in question is derived from Section 47 of an act entitled, "An Act for the formation, establishment and government of towns", (P. L. 1895, p. 218). Section 47 of that act expressly gives to Council the power to pass, adopt, alter, modify and repeal ordinances to take effect within the town for the following purposes: "to provide for and enforce the removal of snow and ice from the sidewalks and gutters of streets, by the owners of land fronting thereon," &c. (Comp. Stat. Vol. 4, p. 5529.)

POINT III.

The Judgment below should be Reversed.

Since a reasonably prudent person would not violate the provisions of a statute or ordinance which he as a citizen is in duty bound to obey, and since this Court has repeatedly held as above indicated that such violation is evidence of negligence, and since the ordinance upon which this action is based was a valid ordinance, we submit, it was error for the trial judge to overrule plaintiffs' proofs and to non-suit the plaintiffs.

It is perhaps needless to urge upon this Court the necessity under present day conditions that the sidewalks in the large suburban municipalities adjacent to our large cities, be kept safe for the use of pedestrians. The governing bodies of the

several municipalities have it in their power, where conditions in their municipalities make it necessary, to provide by ordinance that the sidewalks therein shall be cleaned of snow and ice. There is nothing unreasonable in the ordinance of Montclair, which required the snow and ice to be removed within eight hours of daylight after the same accumulated or be covered with sand or ashes if such ice could not be removed. The period of time given was ample. Only reasonable care is required of the property owner, because if he can not remove the ice all he must do is to cover it with sand or ashes for the safety of those, who of necessity must use the sidewalks.

We respectfully submit that the judgment below should be reversed and a new trial be granted.

Respectfully submitted.

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New Jersey Court of Errors and Appeals

JESSIE B. SEWALL and ELBRIDGE C. SEWALL, her husband, *Plaintiffs-Appellant,* *vs.* D. ALVIN FOX and SALLIE S. FOX, *Defendants-Appellees.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES.

Statement of Facts.

Plaintiffs-Appellants instituted suit against the defendants-appellees for damages sustained by them by reason of the fact that plaintiff-appellant, Jessie B. Sewall, fell upon the sidewalk in front of premises owned and occupied by defendants-appellees, and was injured thereby. The complaint is stated in three counts. For this purpose only the first two counts need be considered, as the third merely alleges the husband's damages by reason of the facts stated in the first two counts.

The First Count based the cause of action on an ordinance of the Town of Montclair, within which was the sidewalk in question. In it, it is alleged that defendants-appelles owed a duty to remove snow and ice from the sidewalk in front of their premises by reason of the Town Ordinance, that the defendants-appellees violated the ordinance in not removing snow and ice and that plaintiff-appellant, Jessie B. Sewall, was injured.

The Second Count is based on the theory of a common law duty to keep the sidewalk in front of defendants-appellees' premises free and clear of snow and ice. It is stated that this duty was not performed and that plaintiffs-appellants were damaged thereby.

At the trial plaintiffs-appellants offered to prove the Town Ordinance, the injury, the damages and that snow

and ice were permitted to accumulate on the sidewalk without removal within the time fixed by the Town Ordinance for removal.

The Court then asked if plaintiffs-appellants offered to prove that defendants-appellees were in any way responsible for the accumulation. The answer was "No." The only offer of proof was that a natural fall of snow or natural accumulation of ice was not removed. (See State of Case, page 13, lines 28-38.)

The defendants-appellees objected to the offered proof, which objection was sustained. The plaintiffs-appellants then rested. The defendants-appellees then moved for a non-suit, which motion was granted.

It is important to note at this time that the first of the grounds of appeal may not correctly state the plaintiffs-appellants' position. (See State of Case, page 2, lines 20 to 24. The proof really offered is found on page 12, line 31 to page 14, line 6 of the State of Case. This may or may not be strictly within the statement of an offer to prove the allegations of the complaint. But in view of the fact that the plaintiffs-appellants expressly disavowed any purpose to prove an accumulation of ice or snow for which defendants-appellees were in any way responsible, it is important to keep in mind just what the offer of proof was.

Two questions are raised by this appeal:

1. Were defendants-appellees under a common law duty to each individual pedestrian who used the sidewalk in front of their premises to remove natural accumulations of ice and snow therefrom.

2. Did the ordinance of the Town of Montclair impose upon the defendants-appellees a duty, a violation of which together with an injury and damage to the plaintiffs-appellants gave to plaintiffs-appellants a right of civil action against defendants-appellees for compensation for such damages.

I.

The common law imposes no duty upon a land owner to remove snow and ice from sidewalks in front of his premises.

An expression of this principle by a New Jersey Court is first found in the opinion of Justice Van Syckle in the case of *Courtney* v. *The Central Railroad Company of New Jersey, reported* in 18 N. J. L. J. 173, in the following language:

> "An abutting owner on the highway as such owes no duty to maintain the street or sidewalk in front of his house or premises, and is not responsible for any defects therein which are not caused by his own wrongful act."

This opinion was given on demurrer to the declaration of the plaintiff. Comparison of the declaration therein and the second count of the complaint in the instant case will show that the same facts were relied upon in each, viz., a natural fall of snow or natural accumulation of ice, failure by an abutting owner to remove ice or snow or to cover it with sand or other substance, and an injury.

This principle was considered by the Supreme Court of this State in the case of *Arning* v. *Druding,* 114 Atl. 158. The opinion of Justice Bergen deals for the most part with the question of whether the evidence showed an artificial accumulation and storage or snow. The court determined that there was not and affirmed a non-suit. In doing this the court must have proceeded upon the theory that there is no common law right in favor of a pedestrian as against the owner of premises abutting a highway to have natural accumulation of snow and ice removed from the sidewalk.

The Supreme Court of the State considered the similar question of duty of abutting owners to repair sidewalks in the case of *Rupp* v. *Burgess,* 70 N. J. L. 7. The

opinion is that of Chief Justice Gummere. The following is material to the present discussion:

> "The first count, plainly, discloses no cause of action. It is based upon the assumption that the owner and occupant of premises abutting upon a public street is under a legal duty to keep in repair the sidewalk in front of his property. But no such obligation rests upon him unless by virtue of requirements of a city or municipal ordinance. (Dill Mun. Corp., Section 1012: Weller *vs.* McCormick, 18 Vr., 397), and the declaration fails to allege the existence and any such requirement."

The case of *Weller* v. *McCormick,* 47 N. J. L. 397, cited in the above opinion is one involving injury from a limb of a tree falling upon a pedestrian lawfully using a sidewalk. The tree had been planted on the sidewalk, but there was no evidence that the defendant had placed it there. It was held that the injured plaintiff could not recover from the abutting owner.

The New York case of *City of Rochester* v. *Campbell,* 123 N. Y. 405, is valuable for the statement of fundamental rules therein stated, as well as for the opinion on the pertinent issue of the case. One of the principles, which the Court treats as settled and fundamental, is thus stated:

> "That no obligation to repair streets or sidewalks rests upon the lot owners at common law, but the duty to do so, if any, arises out of the statutory obligations imposed by the state or municipality upon them."

The rule is well stated in *2 Sherman and Redfield on Negligence,* Section 343, at page 875, as follows:

> "The owner, much less a mere occupant, of land fronting on a highway owes no duty, as such to repair any part of the highway, or otherwise make it safe for travel; and it is immaterial that it was originally built by him, if subsequently adopted by the municipality."

II.

No civil right of action in favor of a pedestrian and against an abutting land owner was created by the ordinance of the Town of Montclair.

(a) *The legal rule now is, and has always been, that such an ordinance imposes no such duty.*

The ordinance of the Town of Montclair is set forth at length on pages 18, 19 and 20 of the State of Case. The first section provides that owners and occupants shall remove snow and ice from sidewalks in front of their premises or shall cover ice with sand or ashes within a fixed time under penalty of five dollars. The third section provides for removal by the Town if the owner and occupant neglect to do so and makes the cost of removal a lien upon the premises. Only these two sections are material to the instant case.

The present question was considered by Judge Depue in the case of *Snowden* v. *Dodd,* 8 N. J. L. J. 296. The declaration in this case alleged non-compliance with the city ordinance directing the removal of ice from sidewalks, in addition failure to remove snow and damages. A demurrer to the declaration was filed. As reported, the opinion is as follows:

> "The question in the case was whether the ordinance was intended to impose a duty on property owners for the benefit of such individuals as used the streets, or only to make offenders liable for the penalty. This depends on the purview of the legislature in the particular statute and the language which they have employed."

Judgment was given for the defendant on the ground that no civil liability grew out of the ordinance.

In the case of *Courtney* v. *Central Railroad Company of New Jersey, supra,* the Court also referred to the effect of snow and ice removal ordinances as follows:

> "Ordinances requiring persons to keep their sidewalks free from ice imposes a purely public

> duty and persons injured by slipping on the ice cannot bring private action against the owners of the premises."

Chief Justice Gummere expressed the same idea with reference to failure to repair a sidewalk which had fallen into disrepair in his opinion in the case of *Rupp* v. *Burgess, supra,* in the following language:

> "And when the duty of repairing sidewalks is imposed upon the abutting owner by statute or ordinance, the failure to perform that duty does not render the owner responsible to individuals for injuries received by them, resulting from defects in the sidewalk due to want of repair. The only liability which rests upon the property owner for the non-performance of such a duty is the penalty provided by the statute or ordinance."

In the case of *Rose* v. *Slough,* 92 N. J. L. 233, Justice Kalisch expressed the same idea, with reference to a sidewalk which had bulged and become uneven because of the natural growth of roots thereunder, as follows:

> "The fact that a failure of the owner to observe the behest of the ordinance subjects him to a penalty does not, according to well-settled authority, create a right of action against such owner, by an individual who has sustained an injury arising from non-observance, because the ordinance belongs to a class of ordinance, as well said by Justice Pitney, in Fielders *v.* North Jersey Street Railway Company, *supra* (on p. 352), 'Intended not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, and more particularly if they impose upon property owners a performance of a part of the duty of the municipality to the public, a legislative intent is indicated that a breach of such ordinance shall be remedial only at instance of the municipal government or by enforement of the penalty prescribed therein; and there shall be no right of an action to individual citizens especially injured in consequence of such breach.'"

The case of *Weller* v. *McCormick,* 47 N. J. L. 397, deals in the same manner with the question of injury suffered by reason of a limb falling from a tree planted in the space between sidewalk and curb.

The same principle has been applied uniformly in other states. Among the most instructive are the cases of the courts of Michigan, Massachusetts, New York, Connecticut and Maryland.

One of the earliest and best reasoned of such cases is that of *Kirby* v. *Boylston Market Association,* 14 Gray (Mass.) 249. The material facts are almost identical with those in the present case. If there is any difference it is unfavorable to the Boylston Market Association. Snow and ice had formed from natural causes. In addition water was discharged from the roof to the sidewalk. The matter was reserved for the directions of the full court, which said:

> "But the defendants, as owners and occupants of the land and building abutting upon Boylston Street, are not responsible to individuals for injuries resulting to them from defects and want of repair in the sidewalk, or by means of snow and ice accumulated by natural causes thereon, although, by ordinances of the city it is made the duty of abutters, under prescribed penalties, to keep the sidewalks adjoining their estates in good repair, and seasonably to remove all snow and ice therefrom."

In the case of *Taylor* v. *Lake Shore and Michigan Street Railway,* 45 Mich. 74, Justice Cooley reaches the same conclusion. The material facts are identical with those in the instant case. The City's authority to enact the snow and ice removal ordinance was clear. In conclusion he says, referring to the statute and to the ordinance:

> "If the statute contemplated public duties only, the city ordinance could not go further and give individual rights of action. But neither, we think, has attempted to do so."

The leading New York case is that of *Moore* v. *Gadsden,* 93 N. Y. 12. The usual snow and ice removal ordinance was in effect. Referring to it the Court said:

> "The ordinance of the city is a police regulation, but is not of itself sufficient to give a cause of action to a party injured by an act in violation of its terms."

See also *City of Rochester* v. *Campbell, supra; Kunpfle* v. *Knickerbocker Ice Co.,* 84 N. Y. 488; *Wenzleck* v. *McCotter,* 87 N. Y. 122.

The case of *City of Hartford* v. *Talcott,* 48 Conn. 525, is like that of *City of Rochester* v. *Campbell, supra,* in that, in each the City had paid a judgment recovered against it by a pedestrian who was injured by falling on an ice-covered sidewalk, and the city then sued the abutting land owner, relying on the usual ice and snow removal ordinance. The Court said in part:

> "The individual owes no duty to the public in reference to the way except to remove therefrom all property of his own which obstructs it, and to refrain from doing or placing anything thereon dangerous to the traveller. So far as defects in it result wholly from the operations of nature, the proprietor at whose front they exist is without responsibility for them. Therefore, when ice has accumulated upon the sidewalk to a dangerous extent it is the duty of the municipality to remove or cover it within a reasonable time after its formation." * * *
>
> "Moreover, there not being upon the individual any liability at common law resulting from obstructions in the way wholly the effects of natural causes, such liability is not brought into existence by force of declaration in the ordinance that the obstructions are nuisances, or that it is his duty to remove them; for, as the liability is the creation of the ordinance, it can be no greater than that specifically named therein; and as, in the case before us, the council measured it by a fine with cost of removal, the city has thereby barred itself form enforcing an unnamed and unlimited liability

> beyond. In the matter of statutory penalties the expression of a certainty prevents the existence of an uncertainty."

A comparison of the ordinance, which is stated in full and relied upon in the above case, shows it to be very similar to that of the Town of Montclair.

In the case of *Flynn* v. *The Canton Company,* 40 Md. 312, a city ordinance was relied upon in an action by an individual against the abutting owner. The provisions of the ordinance are stated in the opinion and appear to be the same as those in the Montclair ordinance. The conclusion reached is expressed in the following language:

> "Such being the nature of the duty required, and such being the character of the ordinance in question, we are of opinion the only liability resting upon the property owner is that which the ordinance itself imposes, viz., the prescribed fine or penalty for each neglect, and the cost of removal in every instance of his refusal or neglect. By enforcing these, every object the ordinance was intended to accomplish will be attained. The liability of the parties upon whom it operates extends no further, and against them an action like this cannot be maintained."

This subject is discussed at some length in *2 Sherman and Redfield, supra,* and the same conclusion reached as in the above cases. The substance of the paragraph dealing with this subject is that statutes and ordinances directing snow and ice removal will be construed strictly in favor of the lot owner.

It is, therefore, apparent that the law is and has, for a long time, been well settled to the effect that such snow and ice removal statutes or ordinances as that in effect in the Town of Montclair impose no such duty of removal as to give to an individual who suffers injuries by reason of failure to remove snow or ice a right to recover from the abutting owner for damages for such failure and injuries.

(b) *The above rule is well supported by reason.*

In the case of *Fielders* v. *North Jersey Street Railway Company,* 68 N. J. L. 343, Justice Pitney, speaking for the Court of Errors and Appeals, states clearly the reasoning upon which the principle is based. The question under consideration was the duty imposed by a city upon a street railway company to pave and keep in repair certain sections of the streets. In answer to the questions—to whom is the duty owing and for whose benefit was it created—he said (at p. 352):

> "In examining a municipal ordinance in the effort to determine its scope and purview, and important and sometimes controlling inquiry is, whether it was passed in the exercise of the police power of the municipality for the regulation of the conduct of persons within the corporate limits in order to conserve the safety of persons or property, or whether it is an exercising of the taxing power or of some other governmental power. We find running through the cases a rule of construction almost universally adopted, that where the provisions of an ordinance are intended not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, and more particularly if they impose upon property owners the performance of a part of the duty of the municipality to the public, a legislative intent is indicated that a breach of such ordinance shall be remedial only at the instance of the municipal government or by enforcement of the penalty prescribed therein; and that there shall be no right of action to an individual citizen especially injured in consequence of such breach. The most conspicuous cases of this sort are those that deny liability to private suit for violation of the duty imposed by ordinance upon abutting property owners to maintain sidewalk pavement or to remove ice and snow from the walks."

The fact that Justice Pitney considered the principle supported in this brief as the best illustration of the rule stated by him is worthy of note. He considered that principle settled beyond the shadow of a doubt.

Justice Cooley in the case of *Taylor* v. *Lake Shore and Michigan Railway, supra,* reasoned the same question by reducing the contention that a duty in favor of individuals was imposed by the ordinance to an absurdity as follows:

> "Will it be claimed that if the city council shall require a lot owner to construct a sidewalk in front of his premises, every person who shall come upon the street desiring to pass on foot where the walk should be and who shall be precluded from doing so by the walk not being constructed, may bring suit against the lot owner for the neglect to build it a neglect of duty to the traveller himself? He is damnified in that case as clearly as when he falls upon a dangerous walk and is hurt."

The principal of liability to individuals, if it did exist, must be further extended. Any individual who had occasion to pass over a series of sidewalks to perform his business duties might say that it was unsafe to do so, because of ice and snow. He would have suffered damage to some extent and could maintain an action. Is any court willing to construe into an ordinance, which is silent on the question, a rule which must permit the maintenance of such actions? This merely illustrates the danger and the reason for strict construction of such ordinances. Had the legislative body which enacted this ordinance intended to create liability of abutting owners to individuals, it seems clear that it would have stated that fact clearly with limitations against the absurd results indicated above.

Another absurd result is pointed out in the case of *Flynn* v. *The Canton Company, supra.* The ordinance under consideration there imposed upon police officers the duty of causing snow and ice to be removed from sidewalks where abutting owners neglected to do so. The Court pointed out that if a duty was construed to run from abutting land owners to individuals it must also run from the police officers to the same individuals. Therefore, in view of failure of the city council to specif-

ically impose a duty upon either in favor of individuals, the Court refused to create a duty which would result in such an absurdity.

What seems to be the best and most concise statement of reasoning in support of the rule is found in *City of Hartford* v. *Talcott, supra,* in the following language:

> "For, as the liability is the creation of the ordinance, it can be no greater than that specifically named therein."

The foundation of this statement is strong—the fact of no common law duty to remove snow and ice from sidewalks.

III.

Snow and ice removal ordinances are not analogous to traffic ordinances, fire escape statutes, etc.

This distinction is pointed out by Justice Pitney in *Fielders* v. *North Jersey Street Railway Company, supra.* One class (the Fire Escape and Traffic Legislation) is passed in the exercise of the police powers of the municipality for the regulation of the conduct of persons within its corporate limits in order to conserve the safety of persons or property. The other class (Ice and Snow Removal Legislation) is passed in the exercise of the taxing power or of some other governmental power. Evidently the snow and ice removal ordinance of the Town of Montclair was passed in the exercise of the taxing power. Section 3 (pp. 18 and 19 of State of Case) provides for removal by the city, the certification of the cost thereof to the Board of Assessors and the creation of a lien for such cost.

Snow and ice removal ordinances are also passed for the benefit of the municipality as an organized unit, because they shift the burden of the cost of snow and ice removal from the municipality to the abutting owner. (See Sec. 3 of the ordinance of the Town of Montclair.) The primary duty of keeping streets and sidewalks in

proper condition for use rests upon the municipality. It has power by taxation to obtain funds with which to perform this duty. The ordinance shifts the burden.

The ordinance in the principal case was passed pursuant to legislative authority contained in Compiled Statutes, 1910, pages 3514 and 3515, Secs. 230 to 232, or Secs. 236 to 238. Sec. 230 provides that towns shall have authority to pass ordinances providing for snow and ice removal. Sec. 231 provides that towns shall have authority to provide for snow and ice removal by the street commissioner where the abutting owner fails to remove same. Sec. 232 provides that the cost of such snow and ice removal may be added to the taxes of the abutting owner. Secs. 236 to 238, Compiled Statutes, 1910, page 3515, cover the same, subject in the same general way. The plaintiffs-appellant take the position that the ordinance of the Town of Montclair was enacted pursuant to Section 47 of an act entitled "An Act for the formation, establishment and government of towns" (P. L., 1895, p. 218; Compiled Statutes, 1910, p. 5529, Sec. 368). For the purpose of this discussion it is immaterial which statute is the source of the authority. Each indicates clearly the grant of a power of taxation. Each statute gives power to tax abutting owners for the cost of snow removal should they fail to remove same. In either event, *i. e.*, removal my abutting owner or removal by the town at his cost, a part of the cost of public maintenance is shifted from the town to the individual. That is taxation. In *Fielders* v. *North Jersey Street Railway, supra,* we find the same situation—an ordinance which taxes by shifting the cost of repair of a part of the street from municipality to the street railway company. The ordinance of the Town of Montclair, is, therefore, one passed in the exercise of taxing power, just as that considered in the above case, which is, therefore, a sound precedent.

The nature of the ordinance is not changed by reason of the provision for a fine for violation of the ordinance by failure to remove snow and ice. Penalties are imposed

lawfully for fraudulent returns of taxable estate. Examples of this may be found in Section 25 of the Transfer Inheritance Tax Act (Compiled Statutes, 1910, p. 5310, Sec. 561) and Section 3 of Corporation Tax Act (Compiled Statutes, 1910, p. 5287, Sec. 503).

The case of *Evers* v. *Davis,* 86 N. J. L. 196, is relied upon as an analogy. First it is to be noted that the Court said clearly just this: The statute gave no cause of action to the injured party against the property owner. That was the decision. However, the Court went further for the purpose of future guidance and said the action should be based on negligence, not on the Tenement House Act. The dictum of the Fielders case is not questioned. The decision supports it. This idea is expressed on page 201 in the following language: "The reason why no civil action can be based upon the statute is because no such action or right of action is given by the statute."

Following out this idea that the action should be based upon the theory of negligence, the Court said in effect, that the tenement house act created a standard of conduct, nothing more. Proof of violation could be met by proof that the violation was not negligence.

It appears, therefore, that the Evers case in the opinion of the Court of Errors and Appeals should have been based upon common law liability, and that the only effect of this statute was to define the duty or standard of conduct. Therefore, if there had been no common law duty as between the landlord and the person injured, the cause of action could not be sustained. This brings us to the instant case. As shown above there is no common law duty upon the abutting owner to remove snow and ice from sidewalks in front of his premises.

The case of *Cittadino* v. *Schackter,* 83 N. J. L. 593, deals entirely with the question of whether or not a tenant assumed the risk incident to failure to provide fire escapes by remaining in the premises for a long period of time after knowing of that defect.

In the case of *Feir* v. *Weil,* 92 N. J. L. 610, the Court dealt with the Factory Act which prohibited the employment of children under the age of fourteen years, and imposed a penalty for violation of the act. Again the Court pointed out very clearly that the act gave no remedy to the child or its parent, and that the obligation or right of action, if any, was a common law obligation or right. The effect of the statute was simply to define a standard of conduct.

The same is to be said with reference to the case of *Winch* v. *Johnson,* 92 N. J. L. 219, in which the Court was dealing with the Traffic Act. It was held that the question of negligence was one for the jury, and that failure to observe the traffic rules was simply one of the facts which might be considered as evidence of negligence. The same is true of *Chiapparine* v. *Public Service Railway Company,* 91 N. J. L. 581, in which the Court was dealing with that provision of the Traffic Act which required trolley motormen to sound a signal bell upon approaching street crossings.

It is to be noted that the Traffic Act, Tenement House Act and Factory Act are all statutes dealing with the relationship between individual and individual, or between classes of individuals and classes of individuals. There is in each a common law liability running from one to the other. There is in each a question of what shall be the standard of duty from one to the other. There is in each the exercise of a police power. In Justice Pitney's classification each of these acts falls into that class of legislation described as having been passed in the exercise of the police powers for the regulation and conduct of persons in order to conserve the safety of persons or property. In no one of these cases was there a duty on the state or the municipality to do or refrain from doing the act which is directed or forbidden by the legislation. In no one of these cases was there a burden upon the state or municipality which was to be transferred to an individual. They all differ from the snow and ice removal cases in these respects.

There is, therefore,, no analogy between the Factory Act, Tenement House Act and Traffic Act on the one hand, and snow and ice removal ordinances on the other hand.

The duty of maintaining public highways is upon the municipality having control thereof. It was as an aid to the performance of this duty that the Town of Montclair passed its ordinance requiring removal of snow and ice or the placing of sand and ashes upon the ice. For that reason it is apparent that the requirement for the *removal* of snow and ice was incorporated as an exercise of taxing power and not as an exercise of police power. It is true that the statutory authorities of the ordinance say nothing about providing for the placing of sand and ashes upon the ice, and say nothing about transferring the burden of the cost of doing so to the abutting land owner. It may be that if an attempt were made to shift that burden to the abutting land owner, the same could be successfully resisted on the ground of lack of authority for the ordinance in that respect. It is easily seen that the Town of Montclair thought it lacked this authority because it did not provide for the shifting of that burden, but regardless of that fact, it was a burden shifted; it was the shifting of a burden of doing a thing, which the town should have done, to the individual, whether to be paid for by money or by services, as taxation. Many duties of municipalities are for the benefit of the general public, and of each individual thereof; in fact, taxation itself is, so the statement that the performance of an ordinance is for the safeguarding of the individual in no way classifies the ordinance as the exercise of the police power, or as one creating a standard of conduct as between individual and individual.

IV.

The judgment below should be affirmed.

The ordinance of the Town of Montclair gave no right of action to the plaintiffs as against the defendants. It established no standard of conduct as between the plaintiffs and defendants. It was passed in the exercise of the taxing power given to the town by statute.

We respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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